United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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76-1287

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To be argued by
BERNARD J. FRIED

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1287

UNITED STATES OF AMERICA,

Appellee,

—*against*—

JOSEPH BOSTIC,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
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Of Counsel.

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Preliminary Statement

Appellant, Joseph Bostic, appeals from an order of the United States District Court for the Eastern District, (Bartels, *J.*), entered on November 10, 1975, denying his motion to suppress evidence. Following denial of this motion, Bostic entered a plea of guilty to a one count indictment charging him with possession of stolen mail in violation of 18 United States Code, §1708, preserving the right to appeal from the order denying suppression. On April 26, 1976, he was sentenced as a young adult offender and committed pursuant to 18 U.S.C. §5010(b). Appellant is currently incarcerated.

Appellant does not contest the sufficiency of the evidence herein, but rather he contends that the initial police investigative stop was invalid since there was, allegedly, no reasonable suspicion for the stop.

Statement of Facts[1]

At the hearing, it was developed that the New York City Police Department, in response to the theft of a number of Social Security checks in the Borough Park section of Brooklyn, established a special investigation known as Operation Pony Express. This operation had as its objective the apprehension of those who were stealing the Social Security checks from various apartment house mailboxes (5-6). Since the checks were usually delivered on the third day of each month, Patrolman Robert Rodenburg and his partner, Patrolman Kelly, were assigned to the operation and instructed to conduct monthly surveillances along the portion of Ninth Avenue located in Borough Park.

On March 3, 1975, while Officers Rodenburg and Kelly were conducting their monthly surveillance in connection with their investigation into the stolen checks, they observed appellant Bostic enter and leave at least six different apartment building between 10:00 a.m. and 12:30 p.m. (6). Because of an earlier review of police reports, the surveilling officers knew that tenants in the buildings, which appellant was observed entering and leaving, had previously reported that checks were missing from their mailboxes (60). During this surveillance, appellant was finally observed entering a building and then the officers "lost" him as he exited by the back entrance of the building and went into an alleyway (63). While under surveillance, appellant was observed carrying a black briefcase underneath his arm (37).

On April 3, 1975, the police officers instituted a similar surveillance in the same neighborhood (7). This

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[1] All references are to the transcript of the hearing.

time, at about 10:35 a.m., the officers observed the appellant on the street carrying a similar soft black vinyl briefcase (9, 37). Appellant entered and exited one apartment building and then was observed entering a second apartment house. This second building was located at 4123 Ninth Avenue, a building in which tenants had previously reported checks missing from their mailboxes (8, 60). At this time Officer Rodenburg and his partner believing that the Social Security checks had been already delivered to this building and hoping to catch the appellant in the process of stealing checks, got out of their car and walked into the entrance of the building (11, 62-63). When they entered the building, appellant was standing in the front vestibule, about 25 feet from the mailboxes (62, 68). Rodenburg identified himself and asked appellant Bostic for his identification (12). Bostic replied that he was the building's security guard and showed the officer an identification card which identified him as an employee of a security guard company. However, Rodenburg, due to his investigation, knew the building had no security guard and that, therefore, this answer was false (12-13, 23-24). Consequently, Rodenburg asked appellant for further identification (13, 35). In order to comply with this request, appellant reached to open the black vinyl case that he was carrying under his arm (13, 35).

Officer Rodenburg, a patrolman with 11-1/2 years experience in the New York City Police Department, observed that there was a bulge in the bottom of the briefcase and he stopped the appellant from opening the case and inquired of him what was in the briefcase (13-14). Rodenburg testified that he "thought maybe it was a knife", and then because appellant's reply was vague and unresponsive, Rodenburg put his hand under the briefcase and felt a long, slender, object, which

seemed heavier at one end. Rodenburg testified that he thought that what he had first felt was a knife (20). For his own protection, Rodenburg decided not to allow appellant to reach into the briefcase until the object causing the bulge in the briefcase was identified. He instructed the appellant to open the briefcase, in order that he (Rodenburg) could look inside (14, 20, 31, 32). As instructed, appellant opened the briefcase and Rodenburg observed a yellow-handled screwdriver with the point ground down. In addition, Rodenburg saw a Social Security check in the name of Shirley Kleinman (14).

After observing the check and the screwdriver, Officer Rodenburg advised the appellant of his *Miranda*[2] rights (14) and then asked appellant to whom the check belonged. Appellant Bostic replied that the check belonged to his girlfriend and that the mailman had given the check to him (14, 15). Appellant was then asked if he would be willing to accompany Rodenburg to Kleinman's address, 1025 44th Street (a nearby building) in order to clarify the matter, and appellant agreed to do so (15). Upon arrival at this address, the police officers and appellant went to the apartment of Shirley Kleinman and determinded she was not at home. Rodenburg then talked to a young girl, a resident of the building, who lived on the same floor as Shirley Kleinman, and the girl told him Shirley Kleinman was an old woman (16-17).

Appellant Bostic testified at the suppression hearing; however, his version of the events differed considerably from that of Officer Rodenburg. Bostic contended he was stopped by the officers outside of the apartment building located at 4123 Ninth Avenue, and that the

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[2] *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

policemen formed him back into the building, where he was questioned (40, 43). According to appellant, one of the officers took his briefcase and searched it (4). The only other testimony concerned whether appellant had been previously arrested; on direct examination he said he had not, while on cross-examination he admitted to having been previously arrested (46-48).

At the close of the testimony, the district court, in an oral decision, denied appellant's motion to suppress.[3] The court accepted the testimony of Police Officer Rodenburg and concluded that the "stop" was justified.

ARGUMENT

The Investigative Stop of Appellant by the New York City Police Officers Was Reasonable and Justified.

It is contended that the investigative stop of appellant by the New York City Police officers was invalid. According to appellant's argument, the facts and circumstances developed at the hearing before Judge Bartels did not establish reasonable suspicion to warrant the police officers' decision to stop and question him. Therefore, appellant argues that Judge Bartels incorrectly denied the motion to suppress. Appellant, however, concedes, that if the stop was proper then the subsequent events were justified and not unlawful (App. Br., p. 18, f.n.). We submit that the decision of the district court in denying the suppression motion was correct. The totality of the circumstances were such that the investigative stop was authorized.

The Supreme Court in *Adams* v. *Williams*, 407 U.S. 143, 145-46 (1972), set forth the constitutional test for

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[3] For convenience, Judge Bartels' oral decision is set forth as an addendum to the Government's Brief, *infra* pp. 1a. to 2a.

evaluating the propriety of an investigative stop. The Supreme Court stated:

> In *Terry* this Court recognized that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Id.*, at 22. The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. See *id.*, at 23. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. *Id.*, at 21-22; see *Gaines* v. *Craven*, 448 F. 2d 1236 (CA9 1971); *United States* v. *Unverzagt*, 424 F. 2d 396 (CA8 1970).

See also, *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 878-882 (1975); *Terry* v. *Ohio*, 392 U.S. 1 (1968); and *Sibron* v. *New York*, 392 U.S. 40 (1968).

Of course, since the stop was made by a New York Police Officer, acting under authority of New York law, CPL §140.50,[4] the legality of this stop must be evaluated

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[4] CPL § 140.50, the New York State "Stop and Frisk" law, provides that:

> (1) . . . . a police officer may stop a person in a public place located within the geographical area of such officer's employment when he reasonably suspects that such person is committing, has committed or is about to commit either (a)

[Footnote continued on following page]

according to state law. *United States* v. *Magda*, 409 F. Supp. 734, 738 n. 5 (S.D.N.Y. 1976), on appeal to this Court (argued September 28, 1976; Docket No. 76-1298) (collecting authorities); see *United States* v. *Watson*, 423 U.S. 411, 421, n. 8 (1976). Application of such state law will be rejected only if it violates federal constitutional standards. *United States ex. rel Lupo* v. *Fay*, 332 F.2d 1020, 1022 (2d Cir. 1964). Since the New York "Stop and Frisk" statute, CPL § 140.50, does not offend the federal constitution, *Sibron* v. *New York*, *supra*, and since, as seen below, the "stop" was proper under §140.50, the decision below should be affirmed.

This consideration aside, it is our position that the police activity here was proper either under federal or state law.

Federal law permits an investigative stop by a police officer where there are "specific and articulable facts" to establish a basis for the officer's reasonable suspicion. *Terry* v. *Ohio*, *supra*, 392 U.S. at 21; *United States* v. *Riggs*, 474 F.2d 699, 703 (2d Cir.), *cert. denied*, 414 U.S. 820 (1973). See, e.g., *United States* v. *Gidley*, 527

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a felony or (b) a class A misdemeanor defined in the penal law, and may demand of him his name, address, and an explanation of his conduct.

(2) When upon stopping a person under circumstances prescribed in subdivision one a police officer reasonably suspects that he is in danger of physical injury, he may search such person for a deadly weapon or any instrument, article or substance readily capable of causing serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons. If he finds such a weapon or instrument, or any other property possession of which he reasonably believes may constitute the commission of a crime, he may take it and keep it until the completion of the questioning at which time he shall either return it, if lawfully possessed, or arrest such person.

F.2d 1345, 1348 (5th Cir. 1976); *United States* v. *Solomon*, 528 F.2d 88, 90-91 (9th Cir. 1975); *United States* v. *Hall*, 525 F.2d 857, 859-860 (D.C. Cir. 1976). What is required is that the information provide a "rational basis for an investigatory stop, routine inquiry and request for information" *United States ex rel. Griffin* v. *Vincent*, 359 F. Supp. 1072, 1075 (S.D.N.Y. 1973). Such determination, "(e)specially when dealing with a concept as elusive as 'reasonable suspicion', . . . will of necessity be a case-by-case one." *United States* v. *Ruiz-Estrella*, 481 F.2d 723, 730 (2d Cir. 1973).

The New York Court of Appeals in *People* v. *Cantor*, 36 NY2d 106 (1975), held that an investigative stop of an individual is permitted where the police officer has a "reasonable suspicion that such person is committing, has committed, or is about to commit a crime" (*Id.* at 112). CPL § 140.50. Parallel with federal law, the Court required that "the police officer must indicate specific and articulable facts which, along with any logical deductions, reasonably prompted that intrusion. Vague or unparticularized hunches will not suffice" (*Id.* at 113). More recently, in *People* v. *DeBour*, 40 NY2d 210 (1976), the Court of Appeals upheld an investigative stop and explained that the quantum of suspicion required to justify a stop varies inversely with the degree of intrusion that the stop imposes on an individual:

> The minimal intrusion of approaching to request information is permissible when there is some objective credible reason for that interference not necessarily indicative of criminality. The next degree, the common-law right to inquire, is activated by a founded suspicion that criminal activity is afoot and permits a somewhat greater intrusion in that a policeman is entitled to interfere with a citizen to the extent necessary to gain

> explanatory information, but short of a forcible seizure.
>
> Where a police officer entertains a reasonable suspicion that a particular person has committed, is committing or is about to commit a felony or misdemeanor, the CPL [140.50] authorizes a forcible stop and detention of that person (citations omitted; *Id.* at 223).

The Court, in *DeBour*, concluded that two policeman on a midnight foot patrol, who saw a defendant walk towards them and then cross over the street, were authorized to ask the defendant what he was doing and demand identification. Such a stop was held proper under CPL § 140.50. *Adams* v. *Williams, supra.*

Turning to this appeal, and applying the congruent state and federal standards, we contend that the investigative stop of appellant was justified and proper. There were, to paraphrase *United States* v. *Riggs, supra*, 474 F.2d at 703, a number of "specific and articulable facts" which provided an adequate basis for Officer Rodenburg's reasonable suspicion to justify the minimial intrusion upon appellant's privacy represented by the request for identification. Here, Officer Rodenburg knew that on the third day of each month there had been reported thefts of Social Security checks in the particular apartment house in which appellant Bostic was "stopped", in the apartment house that Bostic had just been seen entering and exiting, and in apartment houses in the immediate neighborhood. He also knew that during the surveillance conducted on the third day of the preceding month, appellant Bostic had been observed entering and exiting at least six different apartment houses in the same neighborhood between 10:00 a.m. and 12:30 p.m., the normal time for mail delivery. The officer also had during this

previous surveillance, personally "lost" Bostic, that is, Bostic, who was observed entering a building, "went out the back side of the building in an alleyway." On both occasions appellant was observed carrying a similar black vinyl briefcase; a case in which stolen Social Security checks could be easily concealed. Moreover, at the time of the stop, Officer Rodenburg had a reasonable basis to believe that the mail had already been delivered to the apartment house.

These facts, "specific and articulable", were enough to create the reasonable suspicion that appellant might be the person who had been stealing Social Security checks from the mailboxes. Indeed, when confronted by the officers, Bostic was standing in the front vestibule of the apartment house, only twenty-five feet from the mailboxes. Consequently, there was ample reason to justify the police officer's demand for identification. *Adams* v. *Williams*, *supra*, 407 U.S. at pp. 145-146; *People* v. *DeBour*, *supra*, 40 N.Y. 2d at p. 220. See also, *United States* v. *Salter*, 521 F.2d 1326 (2d Cir. 1975). Certainly, the suspicions of the officer were reasonable, and he "was not required to shrug his shoulders and allow a suspected criminal to walk away". *United States* v. *Hall*, *supra*, 525 F.2d at 860.

Thereafter, in response to the inquiry, appellant identified himself as the building's security guard and produced identification which showed that he was employed by a security guard company. Because, Officer Rodenburg knew that the building did not have a security guard, this response was demonstrably and obviously false. At this point, as appellant concedes, "the officer was entitled to better identification" (App. Br., p. 18, f.n.). Now, when appellant started to reach inside his briefcase, Officer Rodenburg, observing a bulge at the

bottom, which he reasonably thought might be a knife, had cause to feel the outside of the briefcase. Indeed, after so doing, his suspicions became further aroused since the object he had felt was long, slender, and seemed heavier at one end. He then instructed appellant to open the briefcase so that he (Rodenburg) could determine the cause of the bulge before he would permit appellant to reach inside the briefcase. The seizure of the Social Security check ensued. Appellant correctly concedes that if the stop was proper, the ultimate seizure of the check would, under the circumstances detailed, be lawful (App. Br., p. 18, f.n.). See *United States* v. *Riggs, supra*, 474 F.2d at 704.

Accordingly, since the actions of the police officer were entirely reasonable and proper under either federal or state law, the order of the district court denying the motion to suppress was correct. Therefore, it is respectfully submitted that the judgment of conviction should be affirmed.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: October 20, 1976

Respectfully submitted,

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Eastern District of New York.

BERNARD J. FRIED,
JEFFREY H. KAY,
Assistant United States Attorneys,
Of Counsel.

ADDENDUM

* * * * *

The Court: According to the testimony, Robert Rodenburg, a Police Officer of the City of New York, who had been such an officer for over 11½ years, had on April 3, 1975 entered the building at 4123 Ninth Avenue, Brooklyn, New York, to question the defendant, Joseph Bostic, with respect to Social Security checks which had been stolen from the buildings in the neighborhood, including this particular building. He and his fellow officer had seen the defendant in the neighborhood going in and out of various buildings a half dozen times on March 3, 1975, and that Social Security checks had been stolen from the various buildings.

Officer Rodenburg stated that he lost the defendant on March 3, 1975 because the defendant apparently slipped out of the back entrance or alleyway of one of the buildings.

According to the testimony, the mail was delivered on the 3rd of the month and this mail includes Social Security checks. That was the explanation of the surveyance on March 3, 1975.

However, prior to that time the officer had ascertain, in January 1975, from the superintendent of the building, that there was no Security Guard assigned to the building. Again, on March 3, 1975 he had talked with the superintendent of the same building and ascertained there had been no change in efforts to protect the building from the theft of Social Security checks.

Officer Rodenburg stated that when he encountered the defendant at 4123 Ninth Avenue on April 3, 1975, the defendant was carrying a black business or attache case in which there was a long, bulgy, hard object which he thought might be a knife. He had previous to the encounter at 4123 Ninth Avenue seen the defendant enter

and leave two other buildings in the neighborhood. When he faced the defendant he asked him what he was doing in the building and the defendant said he was a Security Guard. The officer testified he knew that this was not true. He then asked the defendant for identification and the defendant produced an identification card showing that the defendant was working for some protective association. With his prior knowledge that there was no Security Guard attached to the building, he asked the defendant for further identification.

Officer Rodenburg stated he had been suspicious the defendant was engaged in stealing Social Security checks from this and other buildings. Upon his request for further identification the defendant then opened the attache case where the Officer saw a long, pointed screwdriver that had been shaven down so it was sharp at the point. He also saw right next to the screwdriver a Social Security check payable to Shirley Kleinman, who lived at 1025 44th Street, Brooklyn, New York, which was in the neighborhood. The defendant, in reply to a question from the officer, stated that Shirley Kleinman was his girlfriend, which was subsequently proven to be untrue.

The Officer indicated that when his life was on the line he wanted to ascertain what was in the attache case. Consequently, we are constrained to conclude this case falls within the parameters of Adams v. Williams, 407 U.S. 143 (1972); Terry v. Ohio, 392 U.S. 1 (1968); People v. Green, 35 N.Y. 2d 193, 360 N.Y.S. 2d 243; People v. Moore, 32 N.Y. 2d 67, 343 N.Y.S. 2d 107; U.S. v. Riggs, 474 F.2d 699, cert. den., 414 U.S. 820 (1973).

Motion to suppress is denied.

(69-72)

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STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 22nd day of October 19 76 he served ~~a copy~~ two copies of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

David Blackstone, Esq.
401 Broadway - Room 1502
New York, N. Y. 10013

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~Washington Street~~ 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this
22nd day of October 19 76

Olga S. Morgan
OLGA S. MORGAN
Notary Public, State of New York
No. 24-5501986
Qualified in Kings County
Commission Expires March 30, 1977